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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LaWanda Calloway)	OEA Matter No. J-0017-08
Employee)	
)	Date of Issuance: January 22, 2008
v.)	
)	Lois Hochhauser, Esq.
D.C. Office of Unified Communications)	Administrative Judge
Agency)	
)	
LaWanda Calloway, Employee		
Everett Lott, Agency Chief of Staff		

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on November 26, 2007, appealing its decision to remove her from her position as a Training Instructor based on the charge of “Inexcusable Neglect of Duty”. The amended notice of final decision, dated October 9, 2007, stated that the removal had an effective date of October 12, 2007. At the time Employee was removed, she was in permanent and career status.

The matter was assigned to me on December 28, 2007. On December 31, 2007, I issued an Order notifying Employee that several issues had to be addressed before this Office’s jurisdiction could be established. The first issue was one of timeliness since Employee filed her appeal on November 26, 2007, beyond the 30 days permitted from the effective date of her removal. The other issue was choice of forum since Employee stated in her petition that the Union had filed an appeal on her behalf prior to filing this appeal. In the Order, Employee was provided with the applicable rules and regulations, and was advised that employees have the burden of proof on issues of jurisdiction, including timeliness. She was directed to submit legal and/or factual arguments in support of her position on these issues by January 15, 2008. She was notified that the record would close on that date unless she was notified to the contrary. Employee filed a timely submission. The record closed on January 15, 2008.

JURISDICTION

The jurisdiction of this Office was not established.

ISSUES

Did Employee meet her burden of proof regarding timeliness and/or choice of forum this matter? If not, should this petition be dismissed?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that the employee filing an appeal with this Office has the “burden of proof as to issues of jurisdiction, including timeliness of filing”. According to OEA Rule 629.1, *id* , the burden must be met by a “preponderance of the evidence” which is defined as “[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.”

The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124 provides a statutory time limit for filing an appeal with this Office. An “appeal shall be filed within 30 days of the effective date of the appealed agency action.” D.C. Official Code §1-606.03 (a) (2001). OEA Rule 604.2, 46 D.C. Reg. at 9299 reflects this requirement, stating that an appeal must be filed “within thirty (30) days of the effective date of the appealed agency action”. The manner in which this time limitation is calculated is provided in OEA Rule 603.1, 46 D.C. Reg. at 9298:

In the computation of time periods which involve calendar days, the first day counted shall be the next calendar day following the day the event occurs from which the time period begins to run. For calendar days, if the last day of the time period is a Saturday, Sunday, or legal holiday, the time period shall be extended to the end of the next business day.

Employee filed her appeal with OEA on November 26, 2007. The effective date of the removal was October 12, 2007. Thus, Employee filed beyond the permissible time period. Employee recognizes that she did not file in a timely manner and explains in her submission that she was waiting for information from the Union. In addition, she states that she was “totally emotionally distressed” and had become homeless as a result of the removal.

The time limit for filing an appeal is mandatory and jurisdictional. *See, e.g., King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), ____D.C. Reg.____ (). The District of Columbia Court of Appeals has affirmed this position, stating that the time limit for filing an appeal with an administrative adjudicatory agency such

as OEA is mandatory and jurisdictional. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985).

The Board has established one circumstance under which it will excuse a late filing. The exception is when an agency fails to provide the employee with “adequate notice of its decision and the right to contest the decision through an appeal”. *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), _____. D.C. Reg. _____. In this matter, the amended final Agency provided Employee with her appeal rights, the OEA website and includes a copy of the appeal form. Thus, Employee does not fall within this exception. Therefore, although the Administrative Judge sympathizes with Employee about the emotional and financial problems caused by the removal, there is not basis to excuse the late filing.

Employee did not meet her burden of proof on this issue of timeliness, and the petition, therefore, should be dismissed.

The second issue is that, according to the information provided by Employee in her petition, the Union filed a grievance on her behalf prior to filling this appeal. Employee cannot pursue this matter with the Union and with this appeal. Employee did not provide any factual or legal argument on this issue in her submission.

D.C. Office of Personnel of Personnel Regulations state in pertinent part:

1601.3 If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one of the following:

- (a) Grieve through the negotiated grievance procedure, or
- (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.

1601.4 An employee shall be deemed to have elected his or her remedy pursuant to Section 1601.3 when he or she files a disciplinary grievance or an appeal under the provisions of this chapter or files a grievance in writing in accordance with the provisions of the negotiated grievance procedure applicable to the parties, whichever occurs first. This section shall not be construed to toll any deadlines for filing.

Similarly, D.C. Office Code (2001) Section 1-616.52 reads in pertinent part:

(d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter [providing appeal rights to OEA] for employees in a bargaining unit represented by a labor organization.

(e) Matters covered under this subchapter that also fall within the coverage of a

negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to Section 1-606.03, or the negotiated grievance procedure, but not both.

(f) An employee shall be deemed to have exercised their option (*sic*) pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever occurs first.

The final amended Agency notice also informed Employee that in lieu of filing an appeal with OEA, she could file a grievance pursuant to the negotiated grievance procedure, but that if Employee elected to file a grievance with the Union, she could not also appeal to OEA. Having filed a grievance with the Union prior to filing this appeal with OEA, Employee cannot pursue this appeal. Employee has not met her burden of proof on this issue. This provides an additional basis for dismissing the petition.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge